

XAVIER KANG YOON MOOK

v.

INSUN DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[ORIGINATING SUMMONS NO. 24-516 OF 1994]
25 JANUARY 1995

CONTRACT: *Sale of house - Time essence of the agreement - Breach - Options available to the innocent party - What damages plaintiff is entitled to.*

By a sale and purchase agreement dated 19 August 1986, the plaintiff agreed to purchase from the defendant (a licensed housing developer) a piece of land together with a single storey low cost house (said house). The plaintiff paid 10% of the purchase price and the balance was payable on instalment basis as envisaged in the said agreement. By clause 18(i) of the said agreement, the defendant agreed to complete the said house and deliver vacant possession to the plaintiff within 24 calendar months from the date of the said agreement. Further, by clause (18) (2) the defendant agreed to pay liquidated damages at the rate of 10% per annum of the purchase price to be calculated on a day to day basis in the event the defendant failed to deliver vacant possession of said house within the time stipulated. In total disregard and in breach of the said agreement, the defendant failed to complete and deliver vacant possession of the said house to the plaintiff and this state of affairs prevailed until the originating summons was filed. Pursuant to clause 7 of the agreement time was the essence of the contract. The plaintiff terminated the agreement and claimed *inter alia* liquidated damages.

Held:

[1] As time was provided to be of the essence of the sale & purchase agreement, the stipulated time period within which the said house had to be delivered to the plaintiff became an essential condition of the sale & purchase agreement. The failure of the defendant to fulfill this condition would entitle the plaintiff to have an option of treating the sale & purchase agreement either (a) as having been repudiated and sue for damages, or (b) as still continuing. The plaintiff rightly exercised his option to proceed under (a).

[2] The language employed in clause 18(2) of the sale & purchase agreement is clear and unambiguous and its natural meaning relate to the right of the purchaser plaintiff to rescind and sue immediately for liquidated damages if the recalcitrant developer failed to deliver the said house within 24 months from the date of the sale & purchase agreement. In construing clause 18(2) of the sale & purchase agreement, one must examine the language employed therein and one must not be influenced by other unnecessary conditions.

[Plaintiffs' claim allowed].

Cases referred to:

Linggi Plantations Ltd. v. Jagatheesan [1972] 1 MLJ 89 (refd)
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 (foll)
Lombard North Central plc v. Butterworth [1987] QB 527 at p. 535; [1987] 1 ALL ER 267 at pp. 271 to 272; [1987] 2 WLR 7 at p. 13 (foll)
Chye Fook & Anor. v. Teh Teng Seng Realty Sdn. Bhd. [1989] 1 MLJ 308 (foll)
Tan Yang Long & Anor. v. Newacres Sdn. Bhd. [1992] 1 MLJ 289 (foll)
Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd. [1987] 2 MLJ 1 (refd)

- a* *Azali bin Bakar v. Insun Development Sdn. Bhd.* [1994] 3 AMR 51 (*cit*)
Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29 FC (*cit*)
Choo Yin Loo v. Visuvalingam Pillay [1930] 7 FMSLR 135 (*cit*)
Bank of England v. Vagliano Brothers [1891] AC 107 (*fol*)

Legislation referred to:

- Contracts Act, 1950 (Act 136), ss. 56, 56(1), 65 & 76
b Housing Developers (Control and Licensing) Act, 1966 (Revised 1973) (Act 118) s. 24
 Housing Developers (Control and Licensing) Regulations, 1970, cl. 17
 Housing Developers (Control and Licensing) Regulations, 1982 cl. 18(2)
 Limitation Act, 1953, s. 6(1)(a)
 Rules of the High Court 1980, O. 28 r. 4

Other sources referred to:

- c* *Halsbury's Laws of England*, 4th Edn., Vol. 9, p. 370
 For the plaintiff - *Adi Radlan bin Abdul Rahman; M/s. Mak, Ng, Shao & Kee*
 For the defendant - *S. Thomas; M/s. Rashid & Lee*

JUDGMENT**Hj. Abdul Malik bin Hj. Ishak J:**

- d* By a sale and purchase agreement dated 19 August 1986, ("S & P agreement"), the plaintiff agreed to purchase from the defendant (a housing developer and licensed under the Housing Developers (Control and Licensing) Act, 1966 (Revised 1973) (Act 118) ("Act")) a piece of land on Lot number PTD 36430, Mukim Tebrau together with a single storey low cost house ("the said house") for RM27,680 (Exhibit "XKYM1" in encl. 2). On 4 July 1986, the plaintiff
- e* paid RM2,768 representing 10% of the purchase price and the balance was payable on instalment basis as envisaged in cl. 4 of the S & P agreement (see the receipt for such payment *vide* Exhibit "XKYM2" in encl. 2). By cl. 18(1) of the S & P agreement, the defendant agreed to complete the said house and deliver vacant possession to the plaintiff within twenty-four (24) calendar months from the date of the S & P agreement and this would be on 18 August 1988. Further, by cl. 18(2) of the S & P agreement, the defendant agreed to
- f* pay liquidated damages at the rate of ten per centum (10%) per annum of the purchase price to be calculated on a day to day basis in the event the defendant failed to deliver vacant possession of the said house within the time stipulated in cl. 18(1) thereof. In total disregard and in breach of the S & P agreement, the defendant failed to complete and deliver vacant possession of the said house to the plaintiff and, this state of affairs prevailed at the time the plaintiff filed his originating summons. It is pertinent to point out that by cl. 7 of the S
- g* & P agreement, time was said to be the essence of the contract. Pushed to a corner, the plaintiff had no choice but to terminate the S & P agreement and, this he did, by sending a notice dated 20 May 1994 to the defendant's address as reflected in the S & P agreement and by way of an AR registered post (see the letter of termination exhibited as "XKYM3" in encl. 2). By cl. 25(1)(a) of the S & P agreement, this notice was deemed to be sufficiently served and received by the defendant. To be doubly sure, the plaintiff sent a second notice
- h* dated 2 June 1994 in the same fashion to the defendant (see Exhibit "XKYM4" in encl. 2). Both these two notices were sent by the plaintiff's solicitors direct to the defendant. Through

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their solicitors, the defendant responded by letter dated 14 June 1994 (Exhibit “XKYM5”) acknowledging receipt of the second notice and requested for time as they were looking into the matter.

On these facts, the plaintiff sought for the following prayers (encl. 3):

1. Suatu pengisytiharaan bahawa defendan telah memungkiri terma-terma sebuah perjanjian Jual-beli bertarikh 19 haribulan Ogos, 1986 (Perjanjian jual-beli tersebut) yang diperuntukkan oleh “Housing Developers (Control and Licensing) Regulations, 1982” dan bahawa plaintiff telah dengan wajarnya menamatkan perjanjian Jual-beli tersebut pada 20 Mei 1994 atau pada mana-mana tarikh yang Mahkamah yang mulia berpendapat patut dan sesuai atau dalam alternatifnya suatu deklarasi bahawa Perjanjian Jual-beli tersebut ditamatkan oleh kerana kemungkiran kontrak oleh defendan;
2. bahawa plaintiff mendapatkan kembali bayaran sejumlah RM2,768 yang merupakan 10% daripada harga pembelian yang dibayar oleh plaintiff kepada defendan pada 4 Julai 1986;
3. bahawa defendan membayar kepada plaintiff ganti rugi jumlah tertentu yang akan dikira pada kadar 10% setahun ke atas harga pembelian sebanyak RM27,680 yang dikira dari hari ke hari dari tarikh yang ditetapkan oleh Perjanjian Jual-beli tersebut untuk penyerahan milikan kosong, iaitu dari 18 Ogos 1988 sehingga tarikh penamatan perjanjian jual-beli tersebut;
4. ganti rugi selanjutnya dan/atau ganti rugi lebih serius;
5. selanjutnya atau dalam alternatif, ganti rugi bagi kemungkiran kontrak;
6. faedah pada kadar 8% setahun ke atas jumlah penghakiman yang dihakimi dari tarikh saman ini sehingga tarikh penjelasan sepenuhnya;
7. Kos di atas dan kos sampingan berhubung permohonan ini dibayar oleh defendan kepada plaintiff; dan
8. Perintah-perintah lain atau perintah selanjutnya diberikan sepertimana Mahkamah yang mulia fikir patut dan suaimanfaat.

It is necessary to make observations. The S & P agreement entered between the parties is a *verbatim* reproduction of the standard S & P agreement as found in Schedule E of the Housing Developers (Control And Licensing) Regulations, 1982 made pursuant to s. 24 of the Act. As stated earlier, the defendant duly licensed under the Act has no choice but to adopt the standard S & P agreement as set out in Schedule E of the Housing Developers (Control and Licensing) Regulations, 1982. This means that there is a statutory flavour to the S & P agreement entered between the parties.

Since time is the essence of the S & P agreement, it is appropriate, at this juncture, to refer to s. 56(1) of the Contracts Act, 1950 (Act 136) which enacts, *inter alia*, that where time is the essence of the contract, failure to perform within the stipulated time will entitle the injured party to avoid the contract. But the injured party has the right to elect not to avoid the contract but to insist on performance and sue for damages. Lord Hailsham pointed out in *Linggi Plantations Ltd. v. Jagatheesan* [1972] 1 MLJ 89 that s. 56(1) of the Contracts Act, 1950 (Act 136) should be read closely with s. 65 of the Contracts Act, 1950 (Act 136) which

- a** provides for the consequences of rescission of a voidable contract. Lord Diplock in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 in considering the effect of the failure to perform within a specified date said succinctly:

Time being of the essence of the provisions in the sale agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end.

- b** *Halsbury's Laws of England*, 4th Edn., Vol. 9 at p. 370 sets out the general rule that:

Where one party to a contract has committed a serious breach by a defective performance or by repudiating his obligations under the contract, the innocent party will have the right to rescind the contract; that is to treat himself as discharged from the obligation to tender further performance, and sue for damages for any loss he may have suffered as a result of the breach.

- c** The breach itself does not terminate the contract, the innocent party having the right to elect to treat the contract as continuing or to terminate it by rescission.

Mustill LJ in *Lombard North Central plc v. Butterworth* [1987] QB 527 at p. 535; [1987] 1 ALL ER 267 at pp. 271 to 272; [1987] 2 WLR 7 at p. 13, in the same vein said this:

- d** A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.

It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

- e** Applying the above principles to the present case, as time was provided to be of the essence of the S & P agreement, the stipulated time period within which the said house had to be delivered to the plaintiff became an essential condition of the S & P agreement. The failure of the defendant to fulfil this condition would entitle the plaintiff to have an option of treating the S & P agreement either (a) as having been repudiated and sue for damages, or (b) as still continuing. The plaintiff rightly exercised his option to proceed under (a).
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In my judgment, the plaintiff is entitled to terminate the S & P agreement and obtain the 10% of the purchase price; this course of action would place the plaintiff in a position like as though he did not enter into the S & P agreement at all. By virtue of s. 56 of the Contracts Act, 1950 (Act 136), the S & P agreement is said to be voidable at the option of the plaintiff (promisee) if the intention of the parties was to make time the essence of the S & P agreement but if it was otherwise the plaintiff (promisee) is entitled to compensation from the defendant (promisor) for any loss occasioned to the plaintiff by the defendant's failure to deliver the said house at or before 8 August 1988. In my judgment, time was the essence of the contract here and as such the contract between the parties was voidable and since on the due date - this was on 18 August 1988, there was a failure on the defendant's part to deliver the said house, the plaintiff in law had the option either to continue with the contract or to rescind it (see *Chye Fook & Anor. v. Teh Teng Seng Realty Sdn. Bhd.* [1989] 1 MLJ 308 and *Tan Yang Long & Anor. v. Newacres Sdn. Bhd.* [1992] 1 MLJ 289). Faced with a formidable obstacle, Counsel for the defendant conceded that prayers 1 and 2 set out above should rightly be given to the plaintiff and, I so ordered accordingly. In addition to that, an order for post-rescissionary damages in favour of the plaintiff was also made and these should be assessed by the Senior Assistant Registrar by virtue of O. 28 r. 4 of the Rules of the High Court, 1980 (see also *Tan Yang Long's case (supra)*). Incidentally, the post-rescissionary

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damages (prayer 4 of encl. 3) relate to the compensation which the plaintiff sustained through the non-fulfilment of the contract as envisaged under s. 76 of the Contracts Act, 1950 (Act 136).

Next, Miss S. Thomas for the defendant argued strenuously that the liquidated damages sought for in prayer 3 should be rejected principally because of the passages which appeared in the Privy Council's decision of *Loh Wai Lian v. S.E.A. Housing Corporation Sdn. Bhd.* [1987] 2 MLJ 1 especially at p. 4 where Lord Oliver of Aylmerton said: "This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. In their Lordships' judgment, the only sensible construction of cl. 17 is, as Mr. Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for." She argued further that though the Privy Council in *Loh Wai Lian's* case (*supra*) considered cl. 17 of the Housing Developers (Control and Licensing) Regulations, 1970 yet it was akin to cl. 18(2) of the Housing Developers (Control and Licensing) Regulations, 1982 and, consequently, the best time for the plaintiff to sue for liquidated damages would be when vacant possession was delivered and further the limitation period under s. 6(1)(a) of the Limitation Act, 1953 would only be activated when vacant possession was finally delivered to the plaintiff. She cited and relied on *Azali bin Bakar v. Insun Development Sdn. Bhd.* [1994] 3 AMR 51.

Encik Adi Radlan bin Abdul Rahman argued forcefully and meticulously on behalf of the plaintiff and submitted that s. 76 of the Contracts Act, 1950 (Act 136) would allow the plaintiff to claim for liquidated damages forthwith upon the failure of the defendant to deliver vacant possession of the said house within twenty-four (24) calendar months from the date of the S & P agreement.

Abdul Malek Ahmad J in *Chye Fook's* case (*supra*) put the issue of the right of the injured party to claim for liquidated damages to rest, once and for all, in the following words:

At this stage of the proceedings, this Court was not asked to determine whether the rescission would result in the plaintiffs not being able to receive the liquidated damages but in passing I would say that, as provided by s. 76 of the Contracts Act 1950, a party who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract. I had in fact made it clear in my ruling that the plaintiffs' entitlement to liquidated damages if the developer failed to complete within 24 months did not in any way take away the rights of the purchaser to rescind the contract.

Shankar J (now a member of the Court of Appeal) in *Tan Yang Long's* case (*supra*) followed *Chye Fook's* case (*supra*) and ruled that liquidated damages ought to be given to the plaintiffs there.

Two things need to be highlighted here. Firstly, in *Loh Wai Lian's* case (*supra*) the shophouse was delivered on 7 November 1977 long after the due date (that was no 18 September 1975). In the instant case before me, there was no delivery of the said house on the due date just like *Tan Yang Long's* case (*supra*). In fact, the facts in *Tan Yang Long's* case (*supra*) are on all fours with the present case before me. Secondly, the proposition that the purchaser must wait until vacant possession is delivered before he can sue for liquidated damages because only on that day the single sum to be paid can be ascertained and become due and the purchaser can sue for as enunciated by *Loh Wai Lian's* case (*supra*) and applied and accepted in *Azali bin Bakar's* case (*supra*), with respect, in my view, should be accepted cautiously.

- a* Raja Azlan Shah FJ (as His Majesty then was) speaking for the Federal Court in *Malaysia National Insurance Sdn. Bhd. v. Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 FC laid down a stoic principle, viz:

However, I would once again emphasize what has so often been said before, that precedents are not to be slavishly followed; a case may be followed only for its strict *ratio decidendi*.

- b* It is now trite law that where a party to a contract refuses altogether to perform or is disabled from performing his part of it, the other side has the right to rescind it (*Choo Yin Loo v. Visuvalingam Pillay* [1930] 7 FMSLR 135). Rescission of contract with regard to repudiatory breach is not meant to be rescission *ab initio*. In *Chye Fook's* case (*supra*), for instance, the purchaser can rescind and claim for liquidated damages forthwith.

- c* To adopt the proposition in *Loh Wai Lian's* case (*supra*) would cause hardship to the plaintiff in the present case for two potent reasons. Firstly, if the plaintiff is supposed to wait notwithstanding cl. 18(2) of the S & P agreement for the said house to be built and delivered to him before he can sue the defendant for liquidated damages, then at the end of the day the plaintiff would be put in great jeopardy because the limitation period might set in. Secondly, if the plaintiff cannot sue the defendant for liquidated damages upon the defendant's failure to comply with cl. 18(2) of the S & P agreement then it would be

- d* tantamount to the Court allowing eternal procrastination on the defendant's part in building the plaintiff's low cost house with no possible and immediate form of remedy to the plaintiff. I am told that the defendant abandoned the housing project on 1 January 1992 leaving confused and frustrated buyers high and dry for an indefinite period of time. Later, MBF Finance became a shareholder of the defendant's company and somehow by a stroke of fortune managed to float the defendant's company thereby saving it from being wound up.

- e* Alone, MBF Finance cannot revive the abandoned housing project. Fortunately, the Malaysian Government sensitive to the needs of the rakyat established the now famous Tabong Pemulihan Projek Terbengkalai ("TPPT") and with the moneys channeled through Bank Negara, MBF Finance revived the housing project and, finally, surrendered the low cost houses to the disgruntled buyers who opted to continue with the contract. Two questions come to the forefront here: Should the plaintiff wait and not rescind the S & P agreement

- f* hoping that the kind Malaysian Government would come to his assistance by reviving the housing project through TPPT? Must the plaintiff wait that long after rescinding the S & P agreement (perhaps till doomsday) to sue for the liquidated damages? Surely it is not the intention of the Minister in making the Housing Developers (Control and Licensing) Regulations, 1982 (wherein the standard sale and purchase agreement (Land and Building) incorporated as Schedule E and which forms the S & P agreement of the present case) to

- g* deprive the purchaser of his immediate right to rescind and sue for liquidated damages upon the failure of the developer to deliver vacant possession on the stipulated date. In making the Housing Developers (Control and Licensing) Regulations, 1982, the Minister must have thought of the plight of the poor prospective house buyers who are at the mercy of the cunning and rich developers. The language employed in cl. 18(2) of the S & P agreement is clear and unambiguous and its natural meaning relate to the right of the purchaser plaintiff
- h* to rescind and sue immediately for liquidated damages if the recalcitrant developer failed to deliver the said house within twenty four (24) months from the date of the S & P agreement. In construing cl. 18(2) of the S & P agreement, one must examine the language employed therein and one must not be influenced by other unnecessary conditions. As Lord Herschell said in *Bank of England v. Vagliano Brothers* [1891] AC 107:

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I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated.

Though Lord Hershell was dealing with the language of the statute in that case, his germane observations apply equally in construing the words of the standard S & P agreement as found in Schedule E of the Housing Developers (Control and Licensing) Regulations, 1982.

For the reasons adumbrated above, I ordered that the defendant shall pay immediately to the purchaser plaintiff liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price of RM27,680 commencing from 18 August 1988 (the date of vacant possession) to 5 June 1994 (the date of termination of the S & P agreement). Costs should rightly go to the plaintiff.

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